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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID IRE HARTLESS,

Defendant and Appellant.

H026680

(Santa Clara County  
Super. Ct. No. CC270800, CC271129,  
BB259857)

Defendant David Hartless was charged by information No. CC271129, filed April 17, 2003, with one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The information also included two prior strike allegations (Pen. Code, § 667, subd. (b)-(i)),<sup>1</sup> and six prior prison term allegations (§ 667.5, subd. (b)). Defendant was charged by information No. BB259857, filed May 9, 2003, with one count of second degree burglary (§§ 459, 460, subd. (b)). The information also included an on-bail enhancement allegation (§ 12022.1), two prior strike allegations, and six prior prison term allegations. Defendant was charged by information No. CC270800, filed May 22, 2003, with five counts of second degree burglary, and one count each of vandalism (§ 594), misdemeanor wearing a mask or disguise (§ 185), and misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364). The information also

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

included four on-bail enhancement allegations, two prior strike allegations, and six prior prison term allegations.

On June 19, 2003, defendant pleaded no contest to all charged offenses and admitted the on-bail and prior allegations. On October 1, 2003, defendant filed a statement in mitigation and request that the prior allegations be stricken pursuant to section 1385 in all three cases. On October 2, 2003, the prosecutor filed opposition to defendant's motion. The probation report recommended that defendant be sentenced to 175 years to life, consecutive to eight years.

On October 9, 2003, the court heard from Leonard Donk, Ph.D., a psychologist, as well as from defendant, his two sisters, two nephews, and two grandnephews. After hearing argument from the parties, the court denied the motion to strike the priors. The court then stated: "But I feel that one 25-years-to-life sentence is appropriate. And after reviewing defendant's past history, there really is no indication of violence, although I was concerned with Dr. Donk's testimony suggesting the possibility in the future. [¶] I do recognize the early responsibility on the part of Mr. Hartless for what he did, not only by confessing but in his comments today, the age of the prior convictions is obvious, his substance abuse problems, and others. And, therefore, what I propose to do is to sentence him to one 25-year-to-life term, which is what I think is within the spirit of three-strikes law which requires me, as counsel is aware, to make some sentencing decisions to accomplish that task." The court then struck the strikes as to counts 3 through 6 in case No. CC270800, and imposed a sentence of 25 years to life on count 1 (second degree burglary on Nov. 22, 2002), with a concurrent term of 25 years to life on count 2 (vandalism on Nov. 22, 2002), and concurrent middle terms of two years each on counts 3 (second degree burglary on Oct. 31, 2002), 4 (second degree burglary on Oct. 27, 2002), 5 (second degree burglary on Oct. 25, 2002) and 6 (second degree burglary on Dec. 8, 2002). It then imposed and struck the punishment for the on-bail and

prison prior allegations pursuant to section 1385. In both case No. BB259857 and case No. CC271129, the court struck the strike priors, then imposed and terminated probation.

Defendant filed a timely notice of appeal as to all three cases. We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We notified defendant of his right to submit written argument in his own behalf. He exercised that right by submitting a letter that was filed on July 26, 2004. We reviewed the entire record and defendant's letter, then asked the parties to brief the following issues:

1. Was the imposition of concurrent sentences<sup>2</sup> for counts 3, 4, 5 and 6 in case No. CC270800, as well as for the counts in case Nos. CC271129 and BB259857, an unauthorized sentence pursuant to *People v. Casper* (2004) 33 Cal.4th 38?
2. If so, what is the appropriate remedy?

In response to this court's request, defendant concedes that the trial court could not lawfully impose concurrent sentences on counts 3, 4, 5 and 6 in case No. CC270800. However, defendant argues that upon remand the court may exercise its discretion and impose the same sentence by simply dismissing the counts. The Attorney General agrees that the case must be remanded for resentencing pursuant to *People v. Casper, supra*, 33 Cal.4th 38. However, the Attorney General argues that the trial court may not dismiss counts 3, 4, 5, and 6 upon remand. The Attorney General also argues that the trial court may not again impose and terminate probation in case Nos. BB259857 and CC271129.

## FACTS

### *Case No. CC271129*

On December 16, 2002, at approximately 2:20 p.m., defendant entered the Hall of Justice for arraignment as an inmate. A Santa Clara County sheriff's deputy conducted a

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<sup>2</sup> The letter requesting briefing mistakenly said "consecutive sentences," but both parties understood the issue to be the imposition of concurrent sentences as we state here.

pat-search of defendant and felt a piece of paper in defendant's front pocket. Defendant said that it was his booking sheet. He was asked to take the paper out. The deputy took the paper and felt a lump. He unfolded the paper and saw a small baggie filled with a white powder that later tested positive for methamphetamine with a net weight of .08 grams. Defendant was charged with one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

***Case No. BB259857***

On November 22, 2002, at approximately 5:00 a.m., a Mountain View police officer responded to a report of a burglary at a gas station. Upon arrival the officer spoke to a witness who delivers gas to the station. The witness told the officer that when he arrived at 4:55 a.m., he noticed the front glass door to the business was broken, but he did not see any suspects. The officer went inside and found a metal pry tool lying on the counter near the register and the register drawers open. The manager of the business reported that \$100 had been taken from the register. Defendant was charged with one count of second degree burglary (§§ 459, 460, subd. (b)).

***Case No. CC270800***

**Counts 1 and 2**

On November 22, 2002, at approximately 6:40 a.m., Milpitas police officers responded to an alarm at a cigarette store. Upon arrival they looked through the front door and saw damaged ceiling tiles, indicating a roof-top entry. It also appeared that the burglar, later identified as defendant, used a hammer to knock a large hole in the drywall in an attempt to escape, but was unable to do so due to it being a brick wall. Defendant was located and arrested in an adjacent business that he had entered by crawling through ceiling rafters. Defendant was wearing gloves and had two duffel bags containing 35 cartons of cigarettes and almost \$1,800 in cash. Defendant was charged with one count of second degree burglary and one count of vandalism (§ 594).

### **Count 3**

On October 31, 2002, at approximately 6:15 a.m., a Milpitas police officer responded to an alarm at a supermarket. Upon arrival he saw that a front window had been broken. The burglar, later identified as defendant, had broken the window with an unknown object, entered the store, and stolen cigarettes. Defendant was charged with one count of second degree burglary.

### **Count 4**

On October 27, 2002, at approximately 6:00 a.m., a Milpitas police officer responded to a report of a burglary at a gas station. The burglar, later identified as defendant, had broken a window, entered the garage, and stolen three car diagnostic machines valued at \$12,000. He also broke an inside window of the attached convenience store, entered the store, and removed a cash drawer containing \$300. Defendant was charged with one count of second degree burglary.

### **Count 5**

On October 25, 2002, defendant entered a delicatessen in Milpitas through a broken window and took approximately \$184 in cash and an unknown amount of phone cards. Defendant was charged with one count of second degree burglary.

### **Counts 6, 7 and 8**

On December 8, 2002, at approximately 3:00 a.m., Sunnyvale police officers responded to an alarm at an auto repair shop. Upon arrival, an officer saw a broken window and defendant walking around inside the building wearing a Santa hat and a white beard. Defendant unlocked a door, exited the building, and jumped over the rear fence. The officers chased and apprehended defendant. During a consent search of defendant's vehicle, officers found a glass pipe, glass tubes, baggies, five disposable lighters, and other items indicative of drug sales. Defendant was charged with one count each of second degree burglary, misdemeanor wearing a mask or disguise (§ 185), and misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364).

## DISCUSSION

In *People v. Casper*, *supra*, 33 Cal.4th 38 (*Casper*) the trial court dismissed the one prior strike allegations as to 34 of 35 counts. The court imposed sentence on the remaining count, doubling it (§ 667, subd. (e)(1)) and imposing consecutive sentences for enhancements. It then grouped the other 34 counts essentially by the separately occurring crimes and sentenced without reference to section 667, subdivision (e). In doing so the trial court found that for crimes arising on different occasions a “ ‘consecutive sentence is required . . . .’ ” (*Id.* at p. 41.) The Court of Appeal held that the consecutive sentencing requirements of the three strikes law did not apply to those counts on which the strike allegation had been dismissed, and hence consecutive sentencing was not required under that law even if the counts were not committed on the same occasion and did not arise under the same set of operative facts. The Supreme Court granted the Attorney General’s petition for review. (*Ibid.*)

In reversing the Court of Appeal, the Supreme Court stated: “As we delineated at length in *People v. Hendrix* (1997) 16 Cal.4th 508 . . . , by its terms, section 667, subdivision (c)(6) and (7) requires consecutive sentences whenever a defendant with one or more qualifying prior convictions is convicted, as here, of multiple serious or violent felonies ‘not committed on the same occasion, and not arising from the same set of operative facts.’ (§ 667, subd. (c)(6) . . . .) Consecutive sentencing is discretionary under section 667, subdivision (c) *only* if the current felony convictions are ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts.’ (§ 667, subd. (c)(6) & (7) . . . .) [¶] In addition, section 667, subdivision (c)(6) and (7) applies to ‘a current conviction’ for more than one ‘felony.’ As the Attorney General notes, the ‘term “felony” is not modified, explicitly or implicitly, by any requirement that these multiple felonies be ones to which strike allegations attach.’ Here, while the strike allegation was dismissed as to 34 of the 35 counts, defendant nevertheless remained subject to the consecutive sentencing requirements of section 667, subdivision (c) by virtue of the one

count that retained the strike allegation.” (*Casper, supra*, 33 Cal.4th at pp. 42-43, fn. omitted.)

Here, in case No. CC270800, the trial court chose to strike the prior strikes for purposes of sentencing on all but two of defendant’s six felony counts. On the first of the two remaining counts it imposed a term of 25 years to life. It then properly imposed a concurrent term on the other remaining count, as it was committed on the same occasion and arose under the same set of operative facts, but then sentenced defendant to concurrent sentences on the four other counts, counts 3 through 6. Under *Casper*, consecutive sentences were required for these counts, as the crimes did not arise on the same occasion or under the same set of operative facts. Thus, it is clear and the parties now agree that, under *Casper*, the trial court here imposed an unauthorized sentence when it imposed concurrent sentences on counts 3 through 6, even though a strike allegation was not attached to them.

Where the trial court imposes an unauthorized sentence, it is subject to correction at any time, even if the correction results in a more severe sentence for the defendant. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Serrato* (1973) 9 Cal.3d 753, 764-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Because defendant remained subject to the consecutive sentencing requirements of section 667, subdivision (c), in case No. CC270800 by virtue of the two counts that retained the strike allegations (§ 667, subd. (c)(6); *Casper, supra*, 33 Cal.4th at pp. 42-43), we must remand the matter to the trial court for resentencing.

The Attorney General argues that the trial court also pronounced an unauthorized sentence under section 667, subdivision (c)(6) and (7), when it granted probation and then terminated it in both case Nos. CC271129 and BB259857. The Attorney General argues that, while the drug charge in case No. CC271129 and the burglary charge in case No. BB259857 were brought by way of separate informations from the burglary and vandalism charges in case No. CC270800, all charges were disposed of together at

defendant's change of plea and the trial court imposed sentence on all charges at the same time in one "aggregate judgment." As the crimes charged in case Nos. CC271129 and BB259857 are current convictions which did not arise on the same occasion or from the same set of operative facts (§ 667, subdivision (c)(6)), the Attorney General argues that the court was required to impose consecutive sentences for those crimes.

An "aggregate judgment" was not a condition of defendant's plea. Upon remand, the trial court retains discretion to strike all the alleged strikes in case Nos. CC271129 and BB259857 on its own motion under section 1385, stating its reasons therefore.<sup>3</sup> (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; *People v. Superior Court (Roam)* 69 Cal.App.4th 1220, 1228-1229.)

#### **DISPOSITION**

The judgment is reversed, and the matter is remanded for the limited purpose of resentencing defendant in accordance with the views expressed herein. (See, *People v. Casper, supra*, 33 Cal.4th 38.)

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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PREMO, ACTING P.J.

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WALSH, J.\*

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<sup>3</sup> "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes." (§ 1385, subd. (a).)

\* Judge of the Santa Clara Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.